

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

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DISTRICT OF NEW JERSEY
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DAVID BEASLEY

Plaintiff

V

WILLIAM HOWARD

Defendant

Civil Action No. 1:19-cv-11058

JBS-KMW

**NOTICE OF MOTION IN
OPPOSITION OF DEFENDANT'S
MOTION TO DISMISS COMPLAINT**

Clerk, U.S. District Court
Mitchell H. Cohen Building
U.S. Courthouse 4th and Cooper sts.
Camden, NJ 08101
Honorable Jerome B. Simandle, U.S.D.J.
Honorable Karen M Williams U.S.M.J.

PLEASE TAKE NOTICE of motion to vacate defendant's motion to dismiss. In opposition plaintiff submits brief and exhibits in support of order to deny/vacate defendant's motion.

/s/ David Beasley
David Beasley Plaintiff Pro-Se

June 24, 2019

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

DAVID BEASLEY

Plaintiff

V

WILLIAM HOWARD

Defendant

**Civil Action No. 1:19-cv-11058-
JBS-KMW**

HERE COMES PLAINTIFF moving before the United States District Court for monetary settlement of Five Hundred Thousand Dollars and to abrogate the defendant's Ebony's trademark ownership. Plaintiff will rely on preliminary statement, legal argument and exhibits.

/s/ David Beasley
David Beasley Plaintiff Pro-Se

June 24, 2019

CITED CASES

Christian Fellowship Church v Adidas AG (81 F.3d 986 (Fed Cir 2016)

Dastar Corp. v. Twentieth Century Fox Film Corp. 539 US 23 (2003

Two Pesos, Inc v Taco Cabana, Inc. 921 F. 987 (E.D. NY 1996)

Coach Leatherware Co. v. AnnTaylor, Inc. ., 933 F. 2d 162, 168 (2d .
595 F.2d at 1198, 1201.

Norm Thompson Outfitters, Inc. v. General Motors Corp., 448 F.2d 1293, 1295
n.2 (9th...)

Vision Center 596 F.2d at 115..

Proudfoot Consulting Co. v. Gordon, 576 F.3d 1223, 1230 (11th Cir. 2009.

Am. Television & Commc'ns Corp. v Am. Commc'ns & Television Inc. 810 F.2d
1546, 1549 (11th Cir. 1987)

HGI Assocs., Inc. v. Wetmore Printing Co. , 427 F.3d 867, 873 (11th Cir. 2005).

CITED STATUTES

Lanham Act 15 USC§1125 Section 43 and section 43(a)

U. S. Constitution's Fourteenth Amendment Due Process and Equal Protection
Under The Law.

Fed. Rule Civil Procedure 12(b)6

PRELIMINARY STATEMENT

PLAINTIFF'S CLAIMS ARE NOT PRECLUDED BY THE DOCTRINE OF RES JUDICATA OR THE DOCTRINE OF COLLATERAL ESTOPPEL

THIS IS NOT THE SAME CAUSE OF ACTION addressed to the United States Patent and Trademark Office (USPTO) or that which was decided by the Trademark Trial and Appeal Board (TTAB). And therefore res judicata and collateral estoppel is totally moot. Plaintiff also presents a prima facie case of claims upon which relief can be granted and must be granted. Therefore any motion to dismiss by defendant pursuant to Federal Rule 12(b)(6) must unequivocally be denied.

FIRST AND FOREMOST PLAINTIFF IS SEEKING A JUDGEMENT FOR MONETARY DAMAGES IN THE AMOUNT OF FIVE HUNDRED THOUSAND DOLLARS.

The plaintiff is seeking a judgement for monetary damages in the amount of five hundred thousand dollars which is a minor amount in comparison to the monetary damages caused the plaintiff by the defendant for just the theft of royalties owed the plaintiff that defendant illegally obtained and attempted to obtain from Sound Exchange and other music streaming channels for music and recordings that were not recorded, published or written by Defendant William Howard and his counterfeit group of Ebony's regardless of the trademark issues. See (EXHIBIT A.)

Defendant William Howard did steal and have been collecting, Royalties and payments owed to plaintiff David Beasley and his Ebony's. See (EXHIBIT A.) Still perpetrating this criminal act. The deviant and criminal theft by deception actions of the defendant continues. The defendant by his deceptive practices currently engaged in criminal

methods attempting to collect even more royalties and payments owed and payable to David Beasley and his group The Ebony's consisting of Clarence Vaughn, Jennifer Holmes and James Tuten who is now deceased. See (Exhibit A). And not to William Howard and his group of counterfeit Ebonys who have been infringing publicly with music streaming networks as though he and his group were the group who recorded these songs and they were not.

Defendant was not the artist responsible for the 1970's hit recordings on Philadelphia International Records produced by Gamble and Huff that is Kenneth Gamble and Leon Huff. The first hit record album was titled the Ebonys and on the cover of the Ebony's record album was a hit single song titled "It's Forever" followed by many more hit records such as "You're The Reason Why" and "I Believe," these hit singles have been followed by hit Albums subsequently recorded. Such as the very popular album recording (The Ebonys) "Sing About Life."

These are photographs of the singers and members of the Ebony's singing group. See (EXHIBIT B). The members are David Beasley the founder of the group in 1969 and the other members of the group are James "Bootie" Tuten now deceased, Clarence E. Vaughn, and Jennifer Holmes. .

There are photographs of the Ebonys and the album titled the Ebonys. And The Ebonys "Sing About Life." See (EXHIBIT B.). This is more than a (Preponderance of Evidence) that which is required to prove a civil action lawsuit against defendant for duplicating, counterfeiting and passing off himself as the one who fathered the Ebonys singing group. Causing more lost of income for the plaintiff and trademark confusion with his now registered trademark name for a counterfeit singing group of the already existing Ebonys named singing group. A mistake has been made.

Defendant's attorneys must be aware of the counterfeit "passing off" that the defendant is doing in order to steal the plaintiff's royalties They have the same evidence that supports the plaintiff owns the Ebonys royalties as the recording artist and creator of the recording group. See

International Records Label (PIR) for Rock and Roll Hall of Famers Kenneth Gamble and Leon Huff's famous Gamble and Huff production team. See (EXHIBIT B). The defendant's Ebonys is not deserving nor do they have the track record or reputation with the community as that of David Beasley and The Ebonys.

Plaintiff's first use in commerce of his singing group the Ebonys was January 1, 1969 and every year thereafter. June 25, 2014 the Plaintiff David Beasley and the Ebonys were presented with the Philadelphia Phillies Gamble & Huff Community Partnership Award for their years of commitment to music and the city of Philadelphia. Defendant attempted to block the ceremony claiming he had the registered trademark to the Ebonys name and they could not honor the plaintiff and the Ebonys for their commitment to the community and the city of Philadelphia. See (EXHIBIT C) Evidence of the Phillies Gamble and Huff Community Partnership Award presented to plaintiff David Beasley and the Ebonys for the plaintiff's commitment to music and the city of Philadelphia.

The city of Philadelphia, the Philadelphia Phillies, Gamble and Huff owners of Philadelphia International Records cared less about defendant and his counterfeit Ebony's who were not known, had no community ties and never had anything to do with the Philadelphia International Records Label or the city of Philadelphia.

The honoring and awards presentations to David Beasley and the Ebonys with their legacy and dedication to the music industry and Philadelphia community development was successfully held. See (EXHIBIT C) Also honored for their music legacy with an African American Heritage Award. See (EXHIBIT C). Also see the certification from the treasurer state of New Jersey, (The Ebonys) service mark for entertainment singing group January 1, 1969. First use in Commerce, priority use, first recordings and use of the Ebonys name. See (EXHIBIT C).

Plaintiff has been denied Lanham Act protection under Section 43 and 43(a) of the Lanham Act. There is protection of an unregistered Ebonys

trademark for the plaintiff. Here a mistake has been made and defendant's trademark must be abrogated to correct the mistake.

Gamble and Huff have created on Broad Street in Philadelphia PA, the Philadelphia Music Walk of Fame. Recognizing the music legends and groups that recorded on their (PIR) label, Philadelphia International Records known as The Sound Of Philadelphia (TSOP). Some of these artists and groups are Harold Melvin and The Blue Notes, The Ojays, Billy Paul, Patti LaBelle, Archie Bell and The Drells, The Stylistics, Blue Magic, Sister Sledge, Soul Survivors, Teddy Pendergrass, The Moments, Ray, Goodman and Brown, Hall and Oates, Darryl Hall and John Oates, McFadden and Whitehead, Gene McFadden and John Whitehead. And last but not least The Ebonys whom the members of this group for induction are David Beasley, James "Bootie" Tuten, Clarence Vaughn and Jennifer Holmes..

Defendant and his counterfeit group of Ebonys. Are deliberately impersonating and successfully procuring people and audiences into believing they are the same Ebonys. And being paid for their services and performances with the belief from consumers they are the same Ebonys. Who recorded on the Philadelphia International Records label. Another form of "Theft By Deception." See (EXHIBIT B) the actual recording artists David Beasley and The Ebonys with members Clarence E. Vaughn, James "Bootie" Tuten and Jennifer Holmes.

THIS IS NOT AN ISSUE OF A TRADEMARK, BUT AN ISSUE
OF THEFT BY DECEPTION;

Only a deviant, delinquent and criminal minded individual would have the mens rea to couple with the actus reus to cheat, rob and steal another mans birthright or music royalties. The same type of individual defendant has been.

Defendant planned to steal the plaintiff's group name and all of the royalties owed to the plaintiff and his singing group the Ebonys. See (EXHIBIT A) Upon which the USPTO failed to secure plaintiff's ownership and permitted mass confusion by issuing a registered trademark to the defendant now causing conflict, mistake and confusion with the name and tarnishing the reputation of the accredited name .

The Ebony's created and founded by David Beasley in the state of New Jersey in the year of 1969. Giving priority use to an already established Ebony's singing group. A singing group that has for many decades entertained and committed themselves to community and government functions all their lives to now have themselves erased from the history books because the USTPO erred," MADE A MISTAKE" and issued an Ebony's singing group trademark to defendant when there was already an unregistered Ebony's singing group trademark in existence for over fifty years and protected under section 43(a) of the Lanham Act.

Therefore this US District Court must "RECTIFY THE MISTAKE" and abrogate defendant's Ebony's singing group trademark which cannot take precedence over the plaintiff's already established Ebony's singing group trademark See (EXHIBITS A,B &C).

In spite of the fact that, An unregistered trademark (also known as a common law trademark) is protectable under Section 43 of Trademark (Lanham Act (15 USC § 1125). However, except in certain circumstances, unregistered trademark rights are limited in scope and enforceable only within the geographic region in which the trademark is used or is known by consumers.

Defendant violated Section 43 of the Trademark (Lanham Act 15 (USC§1125) when he knowingly covertly and intentionally registered David Beasley's Ebonys name with the USPTO as though the Ebonys groups was his group. This was in "BAD FAITH" because the defendant knew there was an active Ebonys singing group. When in fact the defendant was once temporarily employed by the Plaintiff in order to sing in the Plaintiff's singing group the Ebonys. Showing defendant obtained a trademark in extreme "BAD FAITH." Defendant knew the plaintiff already had a singing group named the Ebonys. Defendant forged a trademark ownership in "Bad Faith."

The USPTO and TTAB made a mistake and could never have jurisdiction to resolve this matter correctly and in its totality. Fourteenth Amendment Due Process and Equal Protection Under The law could not be administered by the TTAB. Neither the USPTO or the TTAB have the jurisdiction to resolve the five hundred thousand dollars monetary lawsuit settlement .

Not only has the defendant committed theft by deception from Sound Exchange and other streaming and royalty networks. He also committed and is still committing Theft by Deception from venues where he has lead them to believe his group of Ebonys is the same group of Ebonys created and founded in 1969 in Camden NJ by David Beasley and recorded the hit records "It's Forever" and "You are The Reason Why" on Philadelphia International Records with Gamble and Huff. The actual recordings and The Ebonys. See (EXHIBIT B) The production and writing team for these recordings are Kenneth Gamble and Leon Huff. . And defendant is not one of those members and not entitled to the prestige, glory or royalties. See (EXHIBIT A) he has been stealing and attempting to steal.

There are many venues, townships, organizations and individuals that have been hiring the plaintiff and the Ebonys for decades to perform for them. To add further insult to injury the defendant is now sending cease and desist letters threatening these venues not to hire the plaintiff and his singing group The Ebonys. The Unity Community Center have been hiring plaintiff David Beasley and The Ebonys for over 35 years and

now have received cease and desist letters from the defendant. See (EXHIBIT D) causing the community to be upset and ceasing from using Plaintiff and The Ebonys.

After 35 years of performances in their hometown of Camden New Jersey's Unity Community Center. The center and other venues Have now cancelled their appearances and performances after receiving cease and desist letters from the defendant. Causing the plaintiff and his group to lose thousands and thousands of dollars from this. Along with the stolen royalties by the defendant. See (EXHIBIT A) Plaintiff has and is now still losing large amounts of income from future, previous and present endorsements and jobs and that of royalties not yet received because of defendant's attempt to illegally obtain the plaintiff's royalties. See (EXHIBIT A)

Defendant has hindered the plaintiff from working in his own geographic region where plaintiff's unregistered trademark group is known to all the consumers in the Camden NJ and Philadelphia PA. region. This is a prima facie case of violating plaintiff's unregistered trademark protection (also known as common law trademark) which is and has been protected under section 43(a) of Trademark (Lanham Act (15 USC §1125) now presently protected and was protected at the time defendant filed and obtained a USPTO trademark for the same identical group name.

THE UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO) HAVE BEEN DELIQUENT AND MADE A MISTAKE IN THEIR TRADEMARK APPLICATION AND APPLICANT INVESTIGATION PROCESS FOR THE EBONYS SINGING GROUP ALREADY UNREGISTERED TRADEMARK.

The USPTO have been proliferating registered trademark confusion by accepting applications, processing them and "MAKING MISTAKES" by issuing registered trademarks to consumer popular unregistered

trademarks that are already protected under section 43 of Trademark (Lanham Act 15 USC§1125).

These Common Law Rights are enforceable in every state of America under the Fourteenth Amendment to the United State's Constitution's Due Process Clause and Equal Protection Under The Law. A trademark attorney investigates, allegedly to see if the registration of a trademark is likely to cause any confusion to an already consumer friendly common law known and friendly popular unregistered trademark.

David Beasley and The Ebonys have always ben a very popular and well known unregistered trademark singing group.. Any trademark to a subsequent group of Ebonys infringes on the plaintiff and his established group of Ebonys already protected under the Lanham Act section 43(a). See The Ebonys popular and familiar recordings. See (EXHIBIT A) showing the already well known and popular Ebonys singing group members and recordings. Another Ebonys singing group will cause confusion and it has.

The Ebonys group is worldly known like the Temptations or Supremes, and Rolling Stones. And today David Beasley and the Ebonys are Icons in Camden NJ and Philadelphia PA. their geographic area. See (EXHIBIT C) Outstanding awards and accomplishments for David Beasley and The Ebonys.

Unregistered Trademarks 15 USC§1125(a) creates a civil cause of action for claims of false designation of origin and false advertising. This provides federal protection for unregistered marks. Marks not registered with the United States Patent and Trademark Office (USPTO) but may be protected at the state level by common law or statutes associated with unfair competition.

Most states have adopted either the Uniform Deceptive Trade Practices Act or the Model Trademark Bill. Not only protected by first use rule in commerce if you do not register your trademark. You will have legal rights within the geographic areas where you operate . This means you

may be able to stop a subsequent user of the mark, even if it is a bigger company from using the mark in your geographic area.

The objective of the Lanham Act section 43(a) is to also protect unregistered trademarks..The plaintiff's geographical area is Camden NJ and Philadelphia PA. Plaintiff maintains protection under the federal (Lanham Act) which includes prohibition against commercial misrepresentation of source or origins of goods.

Precisely under 15 USC 1125 (Section 43 of The Lanham Act): False Designations of Origin, False Descriptions, and Dilution Forbidden. Therefore with this section of the Lanham Act it was forbidden for the defendant to file for registration of an unregistered trademark and give a FALSE DESCRIPTION of the members of the group and the DESIGNATIONS OF ORIGIN of the group. And the USPTO attorneys failed to prevent this particular cause of action by permitting DILUTION FORBIDDEN registration of an unregistered trademark.

All the entertainment and music world knows The Ebonys (Designation of Origin) is Camden NJ where birth of the Ebonys took place in 1969 and the group have existed and performed for wages to raise and support their families ever since in their Camden NJ (Birthplace) and Philadelphia PA. geographic protected area under the Lanham Act Section 43.

Defendant's trademark application should have been declared null and void. The Ebonys singing group from Camden NJ have been an iconic R & B recording group since their first million dollar hit record "It's Forever" in 1971 and "You Are The Reason Why" in 1974. Philadelphia International Records recording group the Ebonys have always been known and recognized by the public by the Group name The Ebonys. And their members David Beasley founder and creator of the group, singers James "Bootie" Tuten Clarence Vaughn and Jennifer Holmes.

Like the Temptations created by Otis Williams from Detroit Mich. And recorded by Berry Gordy on Motown Records and honored all over the world. Inducted into different and numerous music walks and hall of

fames: So carries the same momentum of the Ebonys created by David Beasley from Camden NJ and recorded by Gamble and Huff on Philadelphia International Records (PIR) and honored all over the World. Inducted into different and numerous music walks and hall of fames. See (EXHIBIT B)

However some music walks and hall of fames are currently refusing to honor or hire David Beasley and his group the Ebonys because of the defendant's cease and desist letters and presentation of his now erroneously owned registered trademark. Defendant has indicated to numerous organizations that he now must receive awards for the Ebony's singing group and not the intended party or intended group of singers that built the foundation and legacy for decades with their recordings, labor, performances and charity in the industry .

Consumers, politicians, entertainers, songwriters, filmmakers and sports teams have known David Beasley and the Ebonys for their community services and charity to the public. Remember Unity Community Center from Camden NJ the home of David Beasley and the Ebonys received a cease and desist letter prevent the Ebonys from performing and using their name in the geographic area where the group members live and have raised their families supporting them with their income performances. See (EXHIBIT D)

Defendant addressed these venues that his now erroneously obtained trademark is being jeopardized and protected under the Lanham Act (15 USC 1114; section 32). However plaintiff's rights were protected under 15 USC 1125; section 43. But the USPTO and their ineffective attorneys allowed defendant to initially violate plaintiff's unregistered Ebonys trademark of over 50 years to be hijacked by the defendant on an accepted and approved trademark application that initially violated the plaintiff's unregistered trademark granting an applicant to a registered trademark knowingly with a false designation of origin, misleading description of fact, causing confusion, mistakes and misrepresentation of characteristics , deceiving the affiliation and geographic origin of the name.

David Beasley-Plaintiff -Pro-Se

LEGAL ARGUMENT

PLAINTIFF IS ENTITLED TO FIVE HUNDRED THOUSAND DOLLARS FROM THE DEFENDANT FOR DAMAGES.

Compensatory damages of five hundred thousand dollars still does not suffice all the monetary damages caused the plaintiff by the defendant. The mental, anguish, depression and anxiety the plaintiff is suffering escalates the monetary damages in excess of five hundred thousand dollars.

The defendant's theft by deception, the stealing, the theft and the attempted theft of music recordings and royalties. Causing overlapping royalty claims and receiving music royalty payments that were for the Ebonys and their members plaintiff David Beasley, Clarence E. Vaughn, James Tuten and Jennifer Holmes. And absolutely not for the defendant William Howard and his group of Ebonys.

Defendant clearly knew that the royalties were for David Beasley and the Ebonys who recorded "It's Forever" and "You're The Reason Why" from David Beasley and The Ebony's album Three very popular albums were recorded by them upon which the first album in 1971 was entitled "The Ebonys" and royalties go to that group of Ebonys and the members David, Beasley, Clarence E. Vaughn and Jennifer Holmes.

To further the confusion after the theft of royalties. Upon the negligence of the USPTO and TTAB the defendant obtained a registered trademark with the USPTO for the same name (Ebonys) records the same two hit recordings " It's Forever" and " You're The Reason Why" and then attempted to collect "Digital Performance Royalties " again from SoundExchange for the Ebonys recording group.

A (Licensing Representative for Royalty Discovery) discovered that defendant William Howard was collecting royalties for the Ebonys singing group. The royalties were for the Ebonys singing group with members David Beasley, Clarence E. Vaughn, James Tuten and Jennifer Holmes. Defendant knew the royalty payments did not belong to him. The defendant's name appeared nowhere on the documents and he had been collecting unlimited amounts of royalties owed to the plaintiff David Beasley, and the Ebony's members Clarence E. Vaughn, James Tuten and Jennifer Holmes. See EXHIBIT A.

The USPTO and the TTAB are guilty of permitting TRADEMARK COUNTERFEITING by the defendant. TRADEMARK COUNTERFEITING is when someone takes an already existing product . And make a duplicate copy of that product. That is counterfeiting that product. Unequivocally, crystal clear in the face. The person who makes the duplicate copy of an already existing product is counterfeiting that product. A Fact there is no other answer. You can only make a counterfeit of something that already existed.

The Ebonys singing group already existed since 1969. For another Ebonys singing group to come along after that would be a counterfeit of the already existing Ebonys singing group. There is no other answer. Defendant William Howard decided to create a singing group and name his group the Ebonys also. There was already in existence a singing group named the Ebonys who had already recorded three hit albums . Upon which David Beasley and the Ebonys still received awards and platinum albums for their work with The Sounds Of Philadelphia (TSOP). However William Howard filed an application for a registered trademark name the Ebonys singing group. Therefore his name the Ebonys is a counterfeit of the already existing Ebonys.

The USPTO registered the Ebonys trademark name to defendant William Howard who was guilty of TRADEMARK

COUNTERFEITING. The USPTO permitted registration of a trademark that was a duplicate or counterfeit copy of an already existing trademark. The federal Trademark Act, also called the Lanham Act prohibits such counterfeiting. Counterfeiting is damaging to the reputation of the already existing product. It is prima facie that the plaintiff already owned the Ebonys name and was protected before the defendant obtained the registered trademark on a counterfeit brand. Therefore the defendant's ownership of a counterfeit brand must be abrogated.

Unregistered trademark protection was allotted to the plaintiff because plaintiff had the Ebonys singing group decades before defendant registered the name. A defendant's duplicate group of Ebonys is a counterfeit group in comparison to the original singing group of Ebonys that the public and consumers have always been familiar with.

The Trademark Counterfeit Act (TCA) is also established to protect unregistered trademarks such as David Beasley's singing group the Ebonys . The plaintiff had priority use and establishment. **Prohibiting** the defendant from filing a registered Ebonys singing group trademark application on an already established Ebonys singing group name that had been consumer friendly and performing for the past fifty years.

It is worth noting that even minimal sale of goods or provision of services (e.g. a single sale) may be sufficient to establish priority of rights in an unregistered mark under common law. In *Christian Fellowship Church v adidas AG* (81 F3d 986 (Fed Cir 2016)), the sale of two hats amounting to \$38.34 to a church member who lived in another state was sufficient evidence of first use in commerce . However, common law rights can be lost if few or no subsequent sale occur over a significant period in relevant geographic area. Thus while initial minimal use can establish priority, continued use must follow in order to maintain unregistered trademark rights under common law.

David Beasley the plaintiff and his singing group the Ebonys have been selling records and performing consistently and continuously for the past fifty years. There have been an abundance of subsequent and continual performances and record sales by the plaintiff and his group

the Ebonys since the conception of the Ebonys singing group in 1969 by the plaintiff. And not just in the required geographic region but all over the world.

The USPTO permitted a miscarriage of justice by permitting the defendant William Howard to file an application for a registered trademark name of the Ebonys singing group when that name Ebonys had already established priority rights and protection as an unregistered trademark by the plaintiff David Beasley. Not only common law rights protection but also protection under the United States Constitution's Fourteenth Amendment Due Process and Equal Protection Under The Law. The USPTO permitted a "SHOCK TO THE JUDICIAL CONCIOUS " permitting a trademark registration for a mark/name Ebonys to the defendant when there had already existed a convincingly crystal clear and established unregistered Ebonys name trademark belonging to the plaintiff. The unregistered trademark rights had already been sufficiently established and maintained by the plaintiff. See (Christian Fellowship Church v adidas AG) .

The USPTO permitted a trademark registration for an already established unregistered trademark. In violation of the (TCA) the USPTO permitted the defendant's counterfeit trademark to become the registered trademark. The defendant's Ebonys registered trademark is a duplicate or counterfeit trademark of the already established plaintiff's unregistered trademark. And the registered trademark does not have priority over the unregistered trademark and this court has the jurisdiction to abrogate and must abrogate the counterfeit registered trademark of the defendant.

To abrogate the defendant's registered Ebonys trademark with the USPTO is the only recourse and resolution to eliminate infringement and confusion of the plaintiff's unregistered trademark protection. Unregistered marks such as the plaintiff's Ebonys

Under US common law principles, the first user of a mark in commerce (the so called "senior user") has priority over all later users of identical

or confusingly similar marks in the geographic area where such prior use occurs.

In *Dastar Corp. v. Twentieth Century Fox Film Corp.* 539 US 23 (2003) Dastar's sale of campaigns without proper credit to the Crusade television series constitute "reverse PASSING OFF" in violation of §43(a) of the Lanham Act. *Two Pesos, Inc v Taco Cabana, Inc* see.. Unregistered trademark, or trade dress and concludes that such a mark or dress should receive essentially the same protection as those that are registered. In *Grupke v Linda Lori Sportswear, Inc.* 921 F. Supp. 987 (E.D. NY 1996) concludes that there remains an issue of fact as to whether they are effectively identical. To the extent that the plaintiffs claim 'passing off' the court will deny summary judgement. ...plaintiffs registered copyright, in count II that defendants willfully violated the Lanham Act by using a reproduction of plaintiffs' copyrighted drawing and infringing their UNREGISTERED TRADEMARK and their...protects an UNREGISTERED TRADEMARK and trade dress against infringement. See *Coach Leatherware Co. v. AnnTaylor, Inc.*, 933 F.2d 162, 168 (2d. Deceptive use...to designate falsely the origin of goods (passing off). 595 F.2d at 1198, 1201. New West also ...alleging infringement of an unregistered trademark. See *Norm Thompson Outfitters, Inc. v. General Motors Corp.*, 448 F.2d 1293, 1295 n.2 (9th...) sued appellant Lindburg and Co. (Lindburg), for trademark infringement arising out of Lindburg's manufacture and sale of jewelry bearing the job's Daughters insignia. The district judge granted..

Defendant William Howard has been "Passing Off" as the Ebonys singing group whose origin had already been established with David Beasley and members of the Ebonys singing group Clarence E. Vaughn, James Tuten and Jennifer Holmes. Defendant has collected, stolen and committed theft of royalties owed to the Ebony's singing group from their 3 albums upon which the first one in 1971 one was entitled The

'Ebonys.'" Theses albums and all the digital performance royalties go to the Ebonys and their members Clarence E. Vaughn, James Tuten and Jennifer Holmes. See (EXHIBIT B).

DEFENDANT'S REGISTERED TRADEMARK NAME EBONYS SINGING GROUP MUST BE ABROGATED.

Defendant's Ebonys name singing group must be abrogated by this court, Defendant's Ebonys name cannot stand because there already existed an active Ebonys name singing group before defendant registered the Ebony's name singing group with the USPTO. Plaintiff David Beasley already had protection of an unregistered trademark name Ebony's singing group. See (EXHIBIT C). Prior use of an already established name gave plaintiff protection under the Lanham Act (15 USC 1125 section 43 and 43(a). and therefore the defendant cannot be protected under the Lanham Act (15 USC§ 1114; section 32)with a subsequent registered trademark without violating plaintiff's prior protection under the Lanham Act (15 USC§ 1125 section 43 and 43(a).

Defendant had websites and other entities, such as facebook pages taken down with cease and desist letters to them claiming ownership of the Ebonys singing group name. Unity Community Center in Camden NJ have the Ebonys from their home town Camden NJ perform for their functions every year for the last 35 years. And now the center is receiving cease and desist letters forbidding them to hire the Ebonys singing group any longer. See (EXHIBIT D) saying the non profit Unity Community Center using the same Ebonys over the past 35 years will now violate defendant's owned Ebonys name under the Lanham Act (15 USC 1114; Section 32) . The registered trademark of the defendant's Ebonys name was issued by the USPTO in violation of the plaintiff's already UNREGISTERED trademark protection under the Lanham Act (15 USC 1125; Section 43) and section 43(a). Obviously a mistake has been made.

The plaintiff had recordings and sold many thousands of records. Top Billboard hits for the EBONYS album named the EBONYS . And the

Ebony's album "Sing About Life." The super hit and world popular song written by Camden New Jersey's Rock and Roll Hall of Famer Leon Huff for David Beasley and his Ebonys from Camden NJ with singing group members Clarence E. Vaughn, James Tuten and Jennifer Holmes, was "It's Forever" on Philadelphia International Records. See (EXHIBIT B).

And in *Christian Fellowship Church v Adidas AG* the sale of two hats amounting to 38.34 to a church member from another state was sufficient evidence for first use in commerce. Plaintiff's first use in commerce was January 1969 and first massive record sales were 1971 . See (Exhibits B & C).

JUDICIAL NOTICE

In an appeal from a bench trial, we review a district's court's conclusion of law de novo and its factual finding for clear error. *Tartell v Fla. Sinus & Allergy Ctr., Inc.*, 790 F.3d 1253, 1257 (11th Cir. 2015). A factual finding is clearly erroneous if, after viewing the totality of the evidence, the court is left with a definite and firm conviction that a mistake was made. *Id.*

Under the Lanham Act, 15 USC§1114(1), a defendant is liable for trademark infringement if the plaintiff shows (1) that its mark has priority and (2) that the defendant's mark is likely to cause consumer confusion. *Frehling Enter., Inc. v. Int'l Select Grp., Inc.*, 192 F.3d 1330, 1335 (11th Cir.1999). Recent changes in section 43(a) broaden what acts violate the Lanham Act. 171 in 1988, Congress passed The Trademark Revision Act of 1988, 172 substantially rewriting section 43(a). 173 With the changes , section 43() became the "premier federal vehicle for asserting infringement of unregistered trademarks, service marks, trade names and trade dress ..." 174 additionally, the Congress codified the case law by granting the same remedies to unregistered mark owners that infringed registered mark owners receive. 175.

A mistake was made and justice cannot be served when the plaintiff had prior unregistered trademark protection under the Lanham Act before the

defendant filed for a registered trademark of the same name. Therefore the defendant's ownership and registered trademark Ebonys name (Trademark number 4,170, 469) must be abrogated. Plaintiff already had protection of Ebonys name under the Lanham Act and therefore the defendant's trademark registration with the USPTO should never have been permitted and with JUDICIAL NOTICE it is prima facie "THAT A MISTAKE WAS MADE."

The defendant obtained USPTO trademark registration number 4,170, 469 for a generic Ebonys singing group name. A duplicate of an already existing Ebonys singing group name. Most courts hold that a generic term is incapable of achieving trade name protection. Vision Center 596 F.2d at 115.. Defendant is not entitled to trademark protection of a generic secondary Ebonys singing group name. "A MISTAKE WAS MADE."

"After a bench trial, we review the district court's conclusion of law de novo and district court's factual findings for clear error." Proudfoot Consulting Co. v. Gordon, 576 F.3d 1223, 1230 (11th Cir. 2009). "The existence of secondary meaning is a question of fact," which we review "under the clearly erroneous standard." Am. Television & Commc's Corp. v Am Commc's & Television Inc. 810 F.2d 1546, 1549 (11th Cir. 1987). A factual finding is clearly erroneous "if, after viewing all the evidence, we are left with the definite and firm conviction that a MISTAKE HAS BEEN COMMITTED." HGI Assocs., Inc. v Wetmore Printing Co., 427 F.3d 867, 873 (11th Cir. 2005)

It is obviously a MISTAKE HAS BEEN COMMITTED. The USPTO issued an Ebonys registered trademark name to the defendant for a singing group that already existed with the same name for the exact same purpose. See (EXHIBIT B). And this mistake has opened the door for the defendant to steal and attempt to steal and collect royalty payments that do not belong to him. See (EXHIBIT A) Causing tremendous harm and financial hardship to the already established Ebonys singing group belonging to the plaintiff.. The defendant's generic secondary Ebonys singing group trademark number 4,170, 469

must be abrogated, the only remedy to correct the mistake of the USPTO.

Plaintiff's Ebonys singing group trademark name was already established and you cannot override or negate plaintiff's prior unregistered trademark protection under the Lanham Act section 43(a). A MISTAKE HAS BEEN COMMITTED and the only rectification for this mistake is abrogation of the defendant's Ebonys singing group trademark which must be classified as generic and counterfeit. The plaintiff already had unregistered Lanham Act trademark protection under Section 43(a) of the Lanham Act. It is prima facie that a MISTAKE AS BEEN COMMITTED. The only rectification and solution for the mistake is to abrogate the defendant's USPTO registered Ebonys singing group trademark.

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

DAVID BEASLEY

Plaintiff

V

WILLIAM HOWARD

Defendant

**Civil Action No. 1:19-cv-11058-
JBS-KMW**

ORDER

It is upon this day _____ 1019 that the plaintiff's opposition
motion to deny the defendant's motion to dismiss res judicata and
collateral estoppel pursuant to Federal Rule 12 (b) 6 is hereby
Granted _____. Denied _____.

/s/ _____
USDJ

Ebonys trademark of over 50 years to be hijacked by the defendant on an accepted and approved trademark application that initially violated the plaintiff's unregistered trademark granting an applicant to a registered trademark knowingly with a false designation of origin, misleading description of fact, causing confusion, mistakes and misrepresentation of characteristics, deceiving the affiliation and geographic origin of the name.

CONCLUSION

Defendant's motion to dismiss pursuant to Federal Rule 12(b)6 must be denied. Res Judicata and collateral estoppel do not apply, they are moot and must be denied. There is a new cause of action and there is also a claim stated upon which relief can be granted.

Plaintiff is entitled to the monetary damages of five hundred thousand dollars resulting in Defendant's theft of royalties from Sound Exchange and other streaming networks. Also from venues that received cease and desist letters from defendant cancelling plaintiff's jobs in his geographic region after decades of performing.

Defendant's registered Ebony's name singing group trademark. must be ABROGATED by this court. The trademark name was issued by the USPTO in violation of an UNREGISTERED Ebonys trademark name that was well established and publicly very popular and already protected under federal trademark law section 43 and 43(a) of the Lanham act. (15 USC §1125; section 43 and 43(a).

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

DAVID BEASLEY

Plaintiff

V

WILLIAM HOWARD

Defendant

**Civil Action No. 1:19-cv-11058-
JBS-KMW**

ORDER

It is upon this day _____ 1019 that the plaintiff's opposition
motion to deny the defendant's motion to dismiss res judicata and
collateral estoppel pursuant to Federal Rule 12 (b) 6 is hereby
Granted _____. Denied _____.

/s/ _____
USDJ

6/16/2019

Gmail - Fwd: SoundExchange Overlapping Artist Claim: THE EBONY'S ref:_00D301FiR0_50013tm4Kk:ref - RESPONSE FROM JOHN LUONGO o...

Kind regards,

John

John P. Luongo

**John Luongo President/CEO - Trecter Entertainment, LLC.
A division of John Luongo Management Recordings, LLC.
Exclusive Worldwide Licensing Representative/ Royalty Recovery**

Mobile: 1-917-213-1699

Email: Luongo.john@gmail.com

Twitter: Luongojohn

Skype: Johnluongo

On Fri, Jun 10, 2016 at 2:45 PM, John Luongo <luongo.john@gmail.com> wrote:

Dear William,

As the legal representative of Clarence E. Vaughn, of the Ebony's, I hereby attest to the fact that he is a legitimate Featured Artist and original member of the band, holding a legal right to his claim of 25% of the digital performance royalties.

Furthermore, only the following members of said band, the Ebonys, are entitled to receive a percentage in equal shares of 25%:

**Clarence E. Vaughn
James Tutten
Ms. Jennifer Holmes
David Beasley**

The parties above are all legally entitled to their rightful share of the Featured Artist Digital Performance Royalties and anyone outside of these individuals attempting to collect, make a claim or representing they are entitled to a Featured Artist Digital Performance Royalty is making a false claim which has serious consequences involved.

It is my intention to resolve this matter amicably, but for that to be the case, I demand all rights of claim to be immediately dropped and a notification sent to Brandon Kyker of SoundExchange, here copied by return email to that effect.

Additionally arrangements must be made for all monies erroneously collected from SoundExchange, starting from the inception of the account up to the last payment received, to be immediately returned so it may be rightfully distributed amongst the verified legal claimants.

I look forward to hearing from and hope that we can resolve this serious matter in the easiest and least disruptive manner possible. My number and email are included to expedite the matter.

Kind regards,

John

John P. Luongo

**John Luongo President/CEO - Trecter Entertainment, LLC.
A division of John Luongo Management Recordings, LLC.
Exclusive Worldwide Licensing Representative/ Royalty Recovery**

Mobile: 1-917-213-1699

Email: Luongo.john@gmail.com

Twitter: Luongojohn

Skype: Johnluongo

(4)



May 20, 2010

The Ebonys
c/o David Beasley
1801 Laurel Road
Lindenwold, NJ 08021

Re: Royalty Statement for PE 12/31/09

Mr. Beasley,

Enclosed please find the most current Ebonys Royalty Statement for ***Period Ending December 31, 2009*** for The Ebonys. Thank you for providing us the necessary contact information needed for future Ebonys royalty statements. Pursuant to our email and phone correspondence, it is our understanding that you are an official and legal representative of the group and are authorized to receive information on the group's behalf.

For any further questions, please give us a call at (215) 985-0900.

Sincerely,



Charles B. Gamble
Executive Vice President
Philadelphia International Records

Cc: Royalty Administration

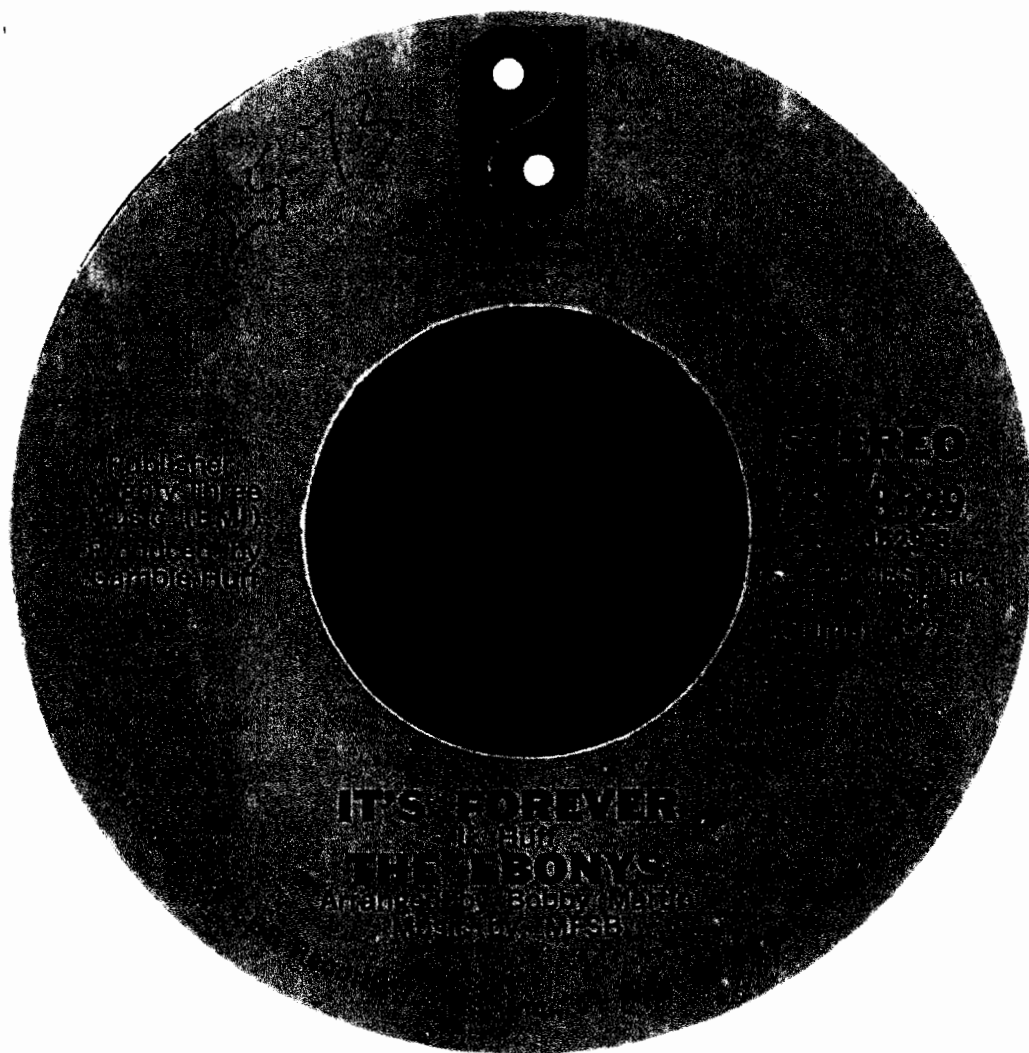


1973

THE EBONYYS



EXHIBIT B



600 × 603 - Images may be subject to copyright. [Learn More](#)

COL-5659
Sony # A-26383

The Blooms

Featuring
You're The Reason Why
It's Forever
I Believe
Plus Much More

The
Collectables

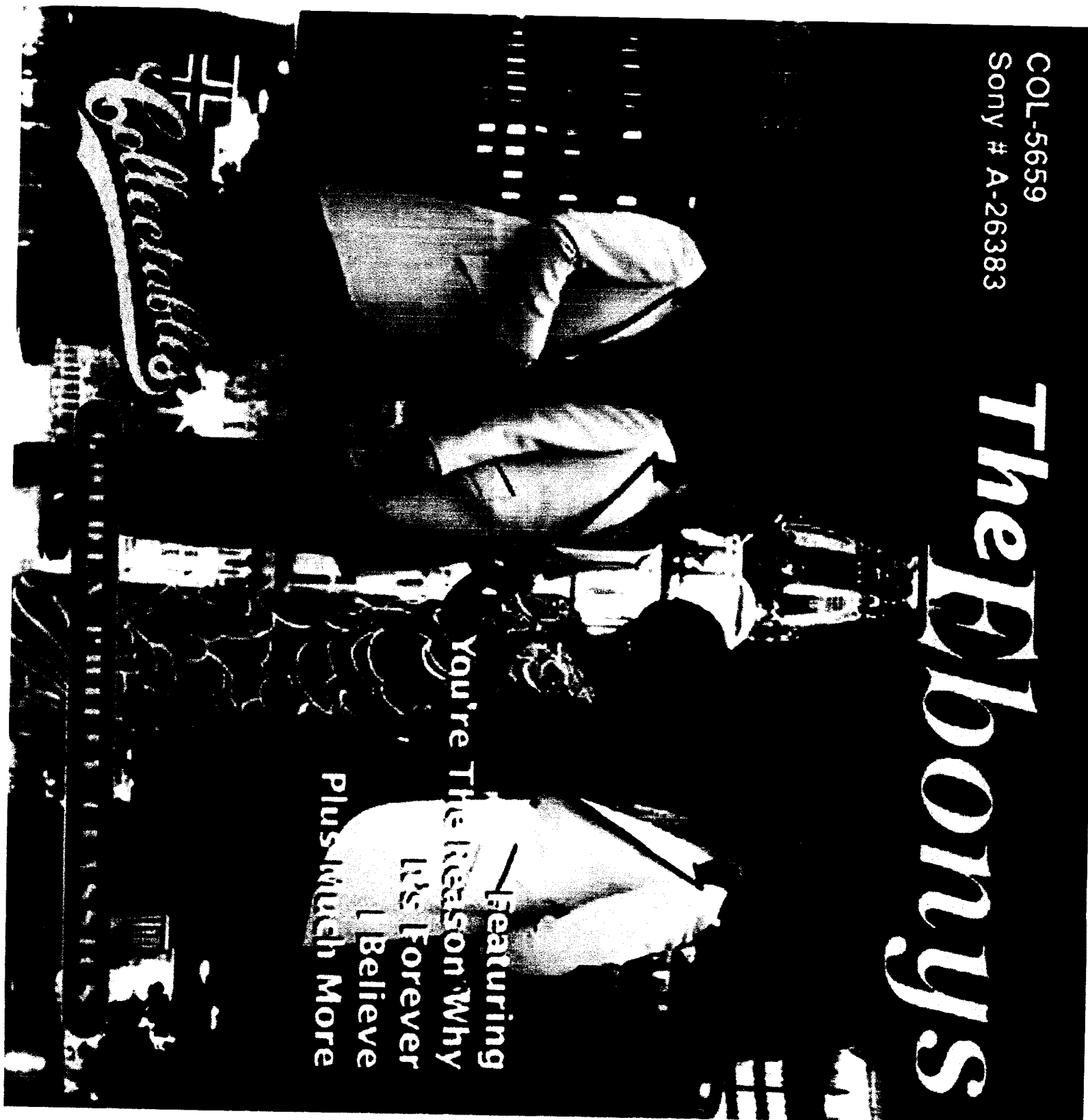




EXHIBIT C

3b.
I, THE TREASURER THE STATE OF NEW JERSEY, DO HEREBY
CERTIFY THAT

DAVID S. BEASLEY
612 TIMBER CREEK CONDOS
LINDENWOLD NJ 08021

DID ON THE 7TH DAY OF MARCH A.D. 2003 FILE IN THIS
DEPARTMENT

SERVICE MARK
MARK REG NUM : 21286

THE EBONYS
ENTERTAINMENT/SINGING GROUP

CLASSIFICATION GROUP : SERVICES
CLASS : 041 EDUCATION AND ENTERTAINMENT

RENEWAL DATE: 03/19/2013
EXPIRATION DATE: 03/07/2018
DATE OF FIRST USE IN NEW JERSEY: 01/01/1969
DATE IN USE ELSEWHERE: 01/01/1969

AS BY THE STATUTES OF THIS STATE REQUIRED.



IN TESTIMONY WHEREOF, I HAVE
HEREUNTO SET MY HAND AND AFFIXED
MY OFFICIAL SEAL AT TRENTON, THIS
19TH DAY OF MARCH
A.D. 2013 .

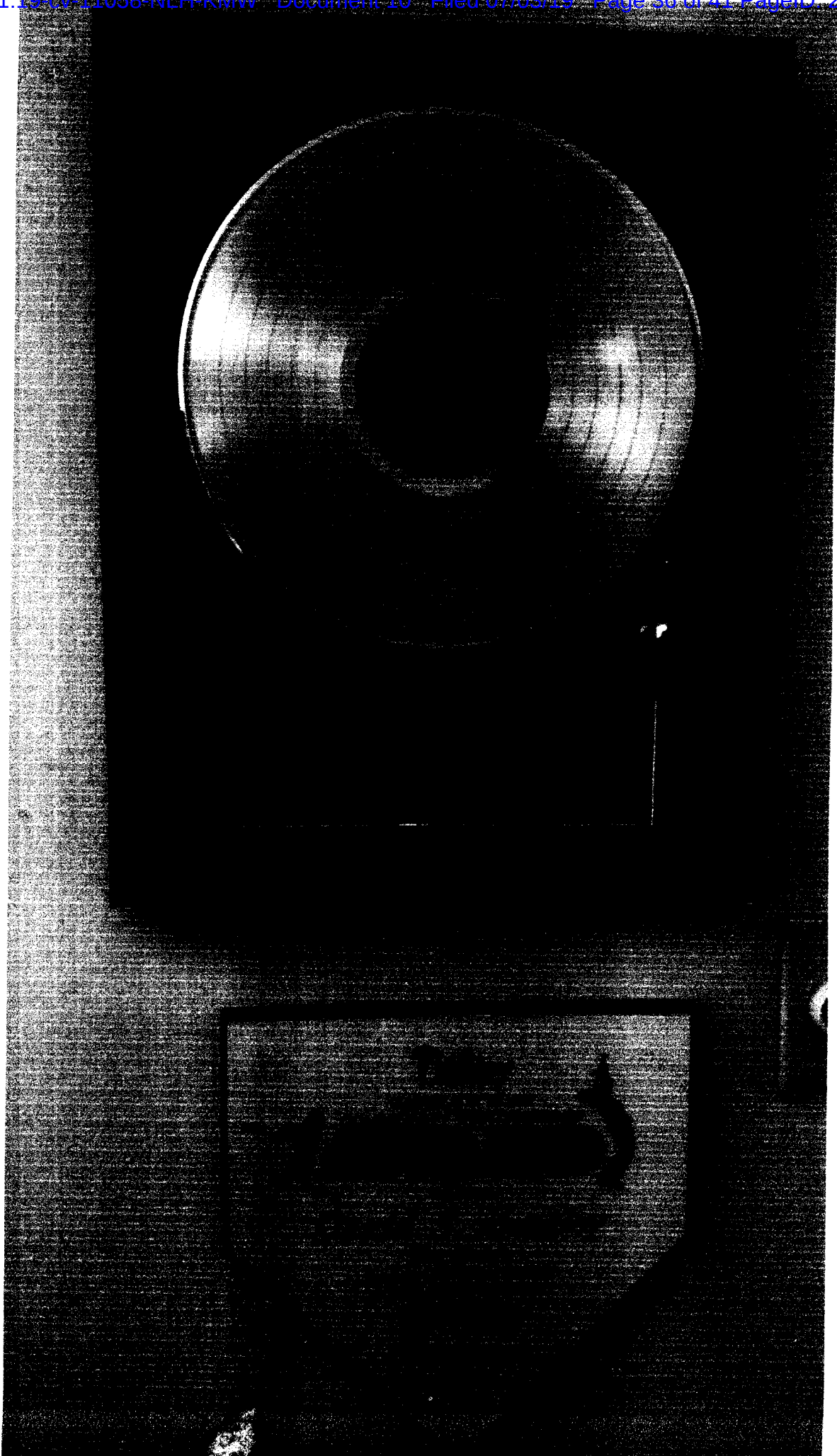
A handwritten signature in black ink, appearing to read "Andrew P. Sidamon-Eristoff".

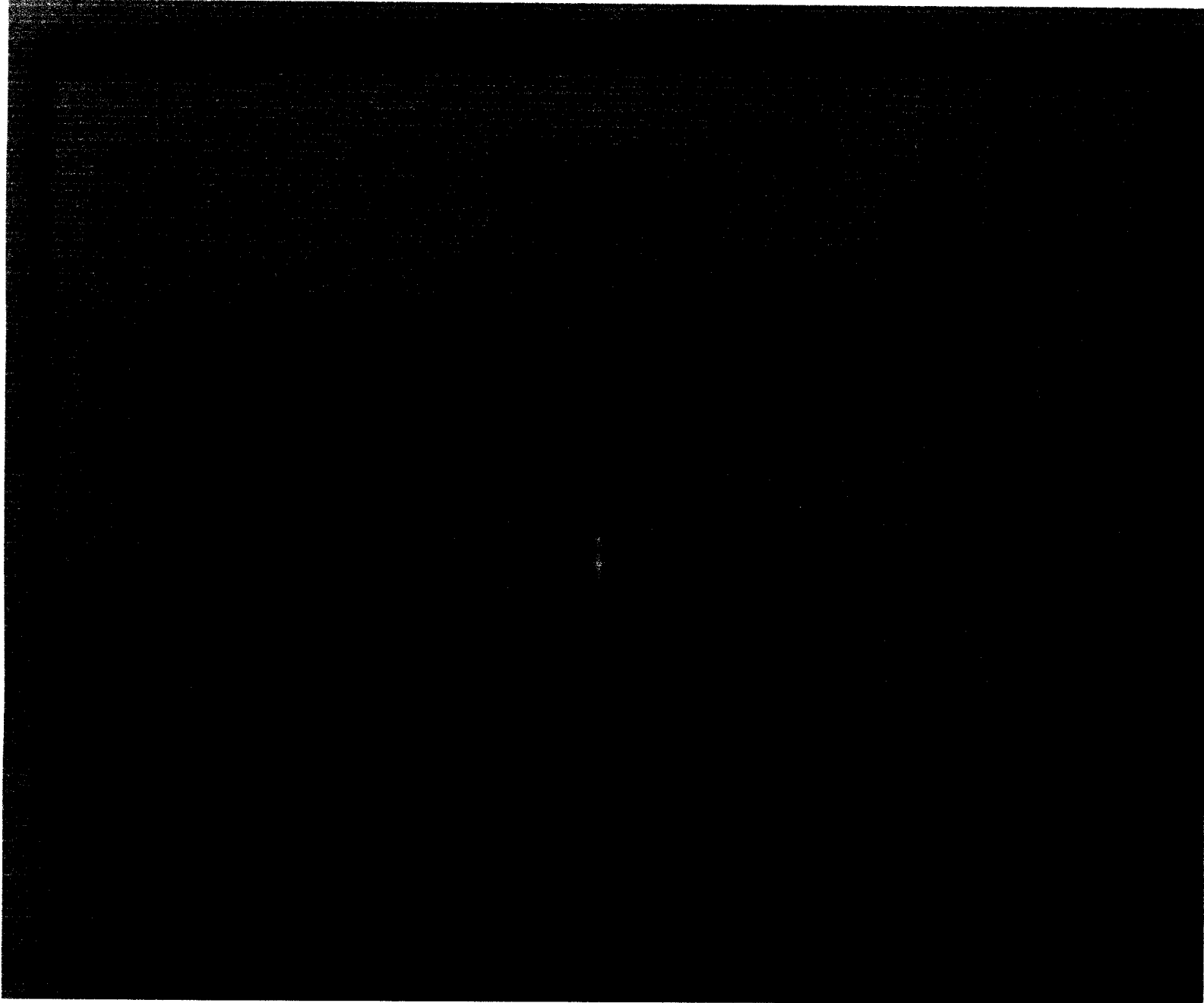
Andrew P Sidamon-Eristoff
State Treasurer

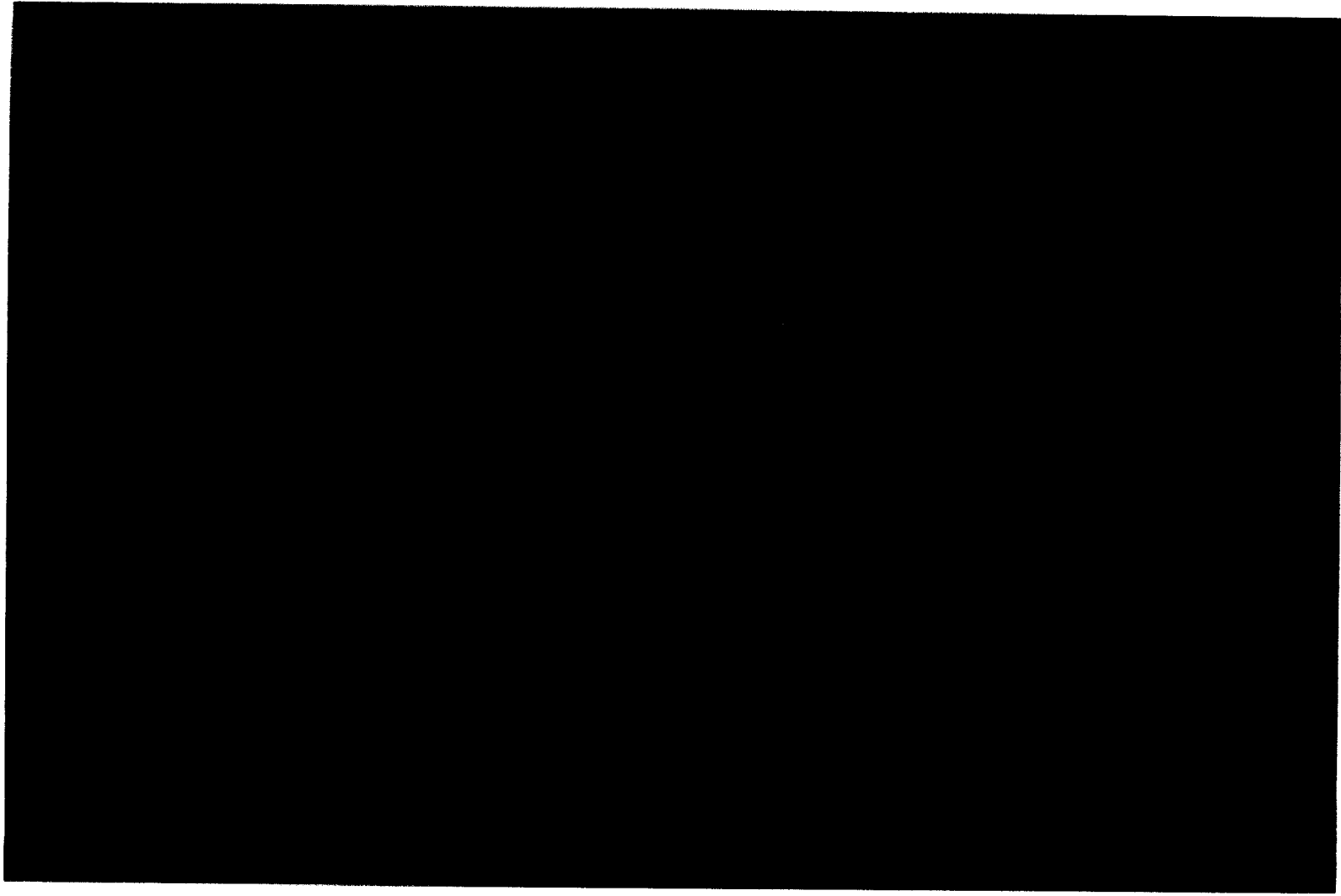
Certificate Number: 127767183

Verify this certificate online at

http://www1.state.nj.us/TYTR_StandingCert/JSP/Verify_Cert.jsp







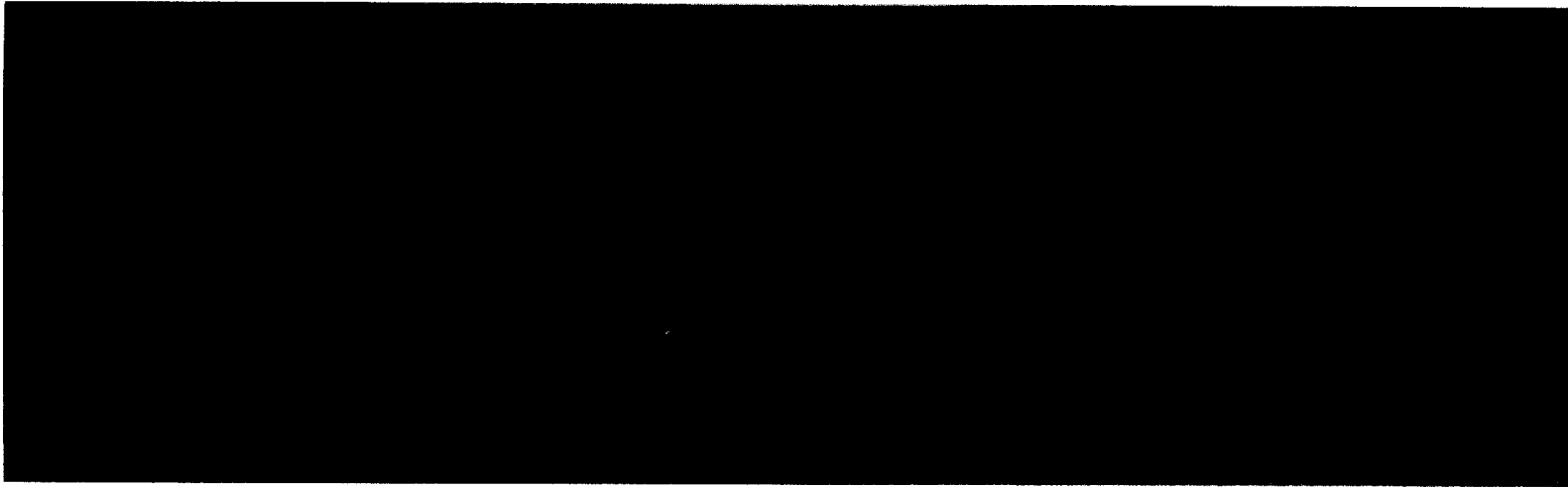


EXHIBIT D



SWING CITY RECORDING ENTERPRISE, INC
104 S. Glenwood Ave
Aldan, PA 19018
610-626-2781
smccombs123@comcast.net

Oct 20, 2016

VIA CERTIFIED MAIL

Unity Community Center
1544 Mt. Ephraim Ave
Camden, NJ 08104

Re: 2nd Notice of Cease & Desist use of Trademark/False, Deceptive Advertising

To Whom It May Concern:

Unity Community Center: Robert Dickerson, Wanda Dickerson, & Ronsha Dickerson,

It has come to our attention that your company has promoted an event on October 15th or 16th, 2016 (Reference copy of enclosed flyer). The musical group identifying themselves as "EBONYS". Your flyer (advertisement) is deceptive. The presence of the name itself, in a distinctive font, prominently positioned in the flyer is considered a necessary implication and is a recognized doctrine in false advertising law and an infringement on our trademark. Mr. Howard has not granted permission to anyone or any other group to use the trademarked name or any derivation thereof.

Advertisement of any group using the trademark name, The Ebonys, violates federal trademark law. The Lanham Act (15 U.S.C. 1114; Section 32) states that you can be held liable in a civil action by the registrant (Mr. Howard). Under subsection (b) hereof, the registrant shall be entitled to recover profits or damages if the acts have been committed with knowledge that such imitation is intended to be used to cause confusion, or to cause mistake, or to deceive.

This letter serves as a formal notice for you and your company to immediately Cease and Desist use of any infringement on The Ebonys trademark, including any name which is a derivation of the trademark. This group has, without permission, infringed on "The Ebonys" Trademark by using a mark that is a "Likelihood of Confusion", similar in appearance, sound, connotation, and commercial impression. The mere addition of a term to a registered mark does not eliminate the similarity, nor does it overcome a likelihood of confusion under Trademark Act Section 2(d).

Please be advised that Mr. William H. Howard, a member of the musical group, The Ebonys, owns said trademark name with the United States Patent and Trademark Office. (Trademark number is 4,170,469).

Respectfully,

A handwritten signature in black ink, appearing to read "Sharon McCombs", is written over a horizontal line.

Sharon McCombs
Executive Director